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Supreme Court, U.S.
FILED

95 • 446 SEP 6 - 1995

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

EL PASO MUNICIPAL
POLICE OFFICERS ASSOCIATION,

Cross-Petitioner,

v.

SYLVIA DeANGELIS,

Cross-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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September 6, 1995

Washington, D.C. • THIEL PRESS • (202) 328-3266

13 pp

QUESTIONS PRESENTED

1. Whether anonymous speech in the form of satirical criticisms of women in the workplace published in a periodical circulated to members of a labor organization can be regulated on the basis of content under the provisions of Title VII of the Civil Rights Act of 1964, as amended?

2. Whether a person has a cause of action for sexual harassment or retaliation under the provisions of Title VII of the Civil Rights Act of 1964, as amended, resulting from the publication of anonymous satirical criticisms of women in the workplace when the application of the provisions of Title VII regulates the speech based on its expressive content?

IDENTIFICATION OF PARTIES

Cross-Petitioner, the El Paso Municipal Police Officers Association, is a labor association made up of members of the El Paso Municipal Police Department. It is a voluntary Association and the exclusive bargaining agent for the members of the El Paso Municipal Police Department.

Cross-Respondent, Sylvia DeAngelis, is an individual and was a member of the El Paso Municipal Police Officers Association at times relevant to the lawsuit.

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ARGUMENT:

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TO THE HONORABLE SUPREME COURT:

The Cross-Petitioner, the El Paso Municipal Police Officers Association [Association], respectfully requests that, should this Court grant the Petition for Writ of Certiorari submitted by the Petitioner, Sylvia DeAngelis, that it also grant Cross-Petitioner's Petition for Writ of Certiorari.

REFERENCE TO OTHER REPORTS OF OPINIONS

This case is reported in 51 F.3d 591 (5th Cir. 1995).

STATEMENT REGARDING JURISDICTION

The Court of Appeals entered judgment on May 10, 1995. No petitions for rehearing were filed. This Cross-Petition for Writ of Certiorari is filed pursuant to Sup. Ct. Rule 12.3. The Cross-Petitioner received DeAngelis' Petition for Writ of Certiorari on August 7, 1995. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statutory provisions involved are found in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e)-2(a):

> "It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because

of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

Sylvia DeAngelis [DeAngelis] was a Sergeant with the El Paso Municipal Police Department and a member of the El Paso Municipal Police Officers Association [Association] at the time this action arose. She complained about various anonymous derogatory articles that appeared in the Association's publication which discussed women in the police force. The Association invited DeAngelis to respond to the articles, but she never did. Instead, she initiated a complaint under Title VII of the Civil Rights Act of 1964, as amended, claiming sexual harassment and retaliation. A jury awarded actual and punitive damages against the Association. The Association defended, in part, on the basis that the anonymous articles were protected speech under the First Amendment and could not form the basis of a complaint under Title VII.

The Fifth Circuit reversed and rendered a take nothing judgment against DeAngelis. The Court found that the comments contained in the articles did not rise to the level of discriminatory conduct under Title VII and that DeAngelis had made a factually insufficient showing of any retaliation or hostile work environment. The Court further decided, under existing precedent, that the four

"printed derogatory references to Sergeant DeAngelis at irregular intervals in two and a half years do not demonstrate sufficient hostility toward her as a matter of law." *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 370-71 (1993). Parenthetically, the Court found that, given the expressive nature of the objectionable speech, the strict application of Title VII to DeAngelis' claims would be a regulation of speech because of its expressive content. The First Amendment normally prohibits such regulation. *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. 2538, 2546-47 (1992); U.S. Const. amend. I. The speech was anonymous speech on a variety of matters of public concern and also the author's opinion of women in the police force. (Appendix to DeAngelis' Petition For Writ of Certiorari pages 1-27). It presumptively enjoys First Amendment protection, and as the Fifth Circuit decided, it does not rise to the level of objectionable speech but was "clumsy, earthy humor." (Appendix to DeAngelis' Petition For Writ of Certiorari page 17). The Court did not reach the constitutional issue because sufficient independent grounds for reversal existed. If the Petition For Writ of Certiorari is granted and the Court's factual sufficiency determination is reversed, then the Cross-Petitioner urges the Court to consider the issue presented here as an independent basis to uphold the judgment. *McIntyre v. Ohio Elections Commission*, ___ U.S. ___, 115 S.Ct. 1511, 1524 (1995); *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. at 2546-47.

SUMMARY OF THE ARGUMENT

1. The First Amendment protects from regulation through Title VII of the Civil Rights Act of 1964, as amended, anonymous satirical speech that is critical of women in the work place when published by a labor organization.

2. Title VII does not provide a cause of action for sexual harassment or retaliation for persons aggrieved by the publication of anonymous satirical articles about women in the work place when those articles are published by a labor union, and the application of Title VII would be a regulation of speech based on its expressive content.

ARGUMENT

I.

ANONYMOUS SPEECH IN THE FORM OF SATIRICAL CRITICISMS OF WOMEN IN THE WORKPLACE PUBLISHED IN A PERIODICAL CIRCULATED TO MEMBERS OF A LABOR ORGANIZATION CANNOT BE REGULATED ON THE BASIS OF ITS CONTENT UNDER THE PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED.

Normally, this Court does not address constitutional issues unless avoidance becomes evasion. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955). Under the cirumstances of this case, the issue of the constitutionally protected nature of the speech is outcome determinative should the Court disagree with the Fifth Circuit's basis for reversal. The broad implications raised by these facts go beyond the immediate interests of the parties and have consequences that potentially affect all labor organizations.

The First Amendment generally prevents government from proscribing speech because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. at 2542. Content-based regulations are presumptively invalid. *Id.* However, there is a narrow group of circumstances in which content-based restrictions on speech have been approved. *See, e.g., Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words). The Court has held that these areas of speech, consistently with the First Amendment, can be regulated because of their constitutionally proscribable content. *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. at 2543. In this case, the speech at issue is satirical in nature and critical of women in the police force. (Appendix to DeAngelis' Petition For Writ of Certiorari page 11). The issue is whether such comments, which do not fall squarely within the recognized exceptions noted above, become proscribable under the Title VII prohibitions against discrimination, harassment or retaliation on the basis of sex. The Fifth Circuit correctly noted that the strict application of Title VII to the facts of this case would require content-based regulation of speech. It cannot be reasonably argued that the speech at issue falls within the definition of proscribable "fighting words." *See R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. at 2547-48. The proscription of the articles in question through application of Title VII violates the First Amendment because it is only directed against speech that is critical of women in the work place. Not every anti-woman sentiment rises to the level of proscribable "fighting words." The expressions here are not vulgar or sexually suggestive; rather, they are expressions of the viewpoints

of an anonymous author regarding a matter of public concern: namely, whether women in the police force pose a risk to public safety and whether they are physically able to perform the job. To prohibit or discourage such speech would seriously impair the free exchange of ideas. Title VII should not be so broadly applied.

II.

NO CAUSE OF ACTION EXISTS FOR SEXUAL HARASSMENT OR RETALIATION UNDER THE PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, RESULTING FROM THE PUBLICATION OF ANONYMOUS SATIRICAL CRITICISMS OF WOMEN IN THE WORKPLACE WHEN THE APPLICATION OF THE PROVISIONS OF TITLE VII REGULATES THE SPEECH BASED ON ITS EXPRESSIVE CONTENT.

Statutes which regulate speech on the basis of its content are presumptively invalid. *R.A.V. v. City of St. Paul, Minnesota,* ___ U.S. ___, 112 S.Ct. at 2542. Title VII provides redress for acts of discrimination directed against persons on the basis of their sex. 42 U.S.C. §2000(e)-2. Anonymous satirical criticisms of women in the workplace or of one woman in particular enjoy the protections of the First Amendment. *McIntyre v. Ohio Elections Com'n.,* ___ U.S. ___, 115 S.Ct. 1511, 1524 (1995). Such protected speech should not give rise to a complaint under Title VII. 42 U.S.C. §2000(e). To hold otherwise would result in the censorship of all criticisms that in any way addressed a constitutionally protected group. Absent proof that the comments fall within the narrow exceptions to First Amendment protection, Title VII should not provide a vehicle for persons holding a differing view from retaliating against the author or seeking to suppress the speech.

CONCLUSION

The provisions of the Civil Rights Act of 1964, as amended, may not be used to regulate speech that is protected under the provisions of the First Amendment. No cause of action for retaliation, discrimination or harassment is provided by the Civil Rights Act of 1964, as amended, for anonymous satirical comments about women in the workplace when those remarks are published by a labor organization. Accordingly, should this Court grant certiorari on any point raised by DeAngelis, then Cross-Petitioner requests that certiorari also be granted on the Cross-Petition.

Respectfully submitted,

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OFFICERS ASSOCIATION, Cross-Petitioner

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SYLVIA DeANGELIS, Cross-Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

RESPONSE TO
CROSS-PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED

1. Whether the free speech protections of the First Amendment to the United States Constitution protect a labor union which widely disseminates blatantly sexist material in its union newspaper from any and all liability under **Title VII of the Civil Rights Act of 1964**, as amended?

LIST OF PARTIES

In accordance with **Rule 14(b)** of the Supreme Court Rules, the parties to these proceedings are identified in the caption of the case. There is a companion case pending in the 120th District Court in El Paso County, Texas (No. 90-2568) wherein the following female police officers are plaintiffs:

1. Mary Barrett
2. Lilia Beard
3. Sherri Campos
4. Maria Luisa Carrillo
5. Sandra Rau Chavez
6. Teresa Chavira
7. Rosalia Cubillos
8. Sylvia DeAngelis
9. Lucille Diaz
10. Elena Duran
11. Zoe A. Gilkison
12. Catherine M. Hendon
13. Margaret E. Hewitt
14. Patricia Madrid
15. Diedre Nelms
16. Susan K. Reed
17. Patricia J. Reyes
18. Nancy Schneider
19. Martha Sida
20. Elizabeth Sierra
21. Patricia E. Spencer
22. Andrea Villanueva

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REFERENCE TO REPORTED CASE

This case is reported at 51 F.3d 591 (5th Cir. 1995).

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on May 10, 1995. Petitioner filed a petition for writ of certiorari on August 7, 1995. Cross-Petitioner filed the Cross-Petition for Writ of Certiorari on September 6, 1995. The court has jurisdiction to review the judgment by writ of certiorari under **28 U.S.C. §1254(1)**.

STATUTORY PROVISION

The statutory provision most directly involved is **42 U.S.C. §2000e-2(a)** which is set out verbatim herein.

"(a) **Employer practices**

It shall be an unlawful employment practice for an employer--

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

Sgt. Sylvia DeAngelis, the highest ranking female police officer in the history of El Paso, was insulted in the Union newspaper, on an intermittent basis spanning two years, because of her sex. Examples of some of these sexist comments (which the Fifth Circuit chose not to publish in their "summarization" of the evidence) include the following:

"Let's face it! broads are just too small and can't deal with man at his root, gut only the strongest survive level!"

*****

"Oh shure, anyone can write reports, and anyone can direct traffic but when the S_____ really hits the fan, ya don't turn to the closest 110# female to back you up."

*****

"Women, men and combat just don't mix for it ain't in the Lards plan! Of course, the Libbers just can't take that!"

The sexist columns commenced in December 1987 and continued through April 1990. The Union newspaper published one thousand copies of each issue, so there was an extremely wide circulation of these offensive publications.

Sgt. DeAngelis successfully convinced the EEOC, an El Paso jury, and a Senior Judge who independently reviewed the evidence and granted declaratory relief, that the publication of this material created a hostile work environment. However, the U. S. Court of Appeals for the Fifth Circuit

held that there was insufficient evidence to support that finding.

In its Cross-Petition, the Union argues that the publication of this material is protected by the First Amendment.

ARGUMENT

Cross-Respondent joins in, and supports, Respondent's Cross-Petition for Writ of Certiorari. This court should address the apparent conflict between Title VII cases which prohibit maintaining a hostile work environment through sexist or racist verbal insults and the First Amendment which prohibits content based limitations of speech.

In *Harris v. Forklift Systems, Inc.* __U.S.___, 114 S.Ct. 367, at 371, (1993) it was expressly held that verbal conduct could violate Title VII's ban on hostile work environments. This court stated that the appropriate test was essentially a factual

determination of whether the statements were repeated with frequency, were severe, were physically threatening or humiliating, or were merely offensive utterances. *Id*, at 371.

In contrast, this court in *R.A.V. v. City of St. Paul, Minnesota*, __U.S.__, 112, S.Ct. 2538 (1992) struck down an ordinance because it prohibited the use of "fighting words" based upon race, color, creed, religion or gender. *Id*, at 2547.

These apparently contradictory holdings should be clarified.

Respectfully submitted,

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